

IN THE SUPREME COURT OF THE STATE OF MONTANA

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Supreme Court Cause No. DA 10-0001

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SHAWN EARL McCLURE,

Defendant and Appellant.

FILED

JUL 20 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

PETITION FOR REHEARING

Pursuant to Rule 20 of the Montana Rules of Appellate Procedure, Shawn Earl McClure (McClure), by and through his counsel Colin M. Stephens, moves this Court to reconsider its Opinion with regard to the following issue:

Whether the District Court erred when it conducted the trial in his absence without first obtaining his knowing, intelligent and voluntary waiver?

State v. McClure, 2010 MT 153, ¶ 5, ___ Mont. ___, ___ P.3d ___.

A petition for rehearing may be considered where this Court “overlooked some question presented by counsel that would have proven decisive to the case.” Mont. R. App. P. 20(1)(a)(ii).

McClure respectfully submits that this Court's opinion overlooked McClure's argument regarding the structural nature of the district court's error of excluding McClure from his trial absent a knowing, voluntary, and intelligent waiver. The Court's decision in this case determined it would not consider McClure's argument for the first time on appeal because McClure did not argue the applicability of the plain error exception.

With respect, the Court's decision overlooks McClure's argument regarding structural error set forth in the Appellant's Opening Brief (AOB, pgs. 12-15) and his Reply Brief (Reply, pgs. 1-2). In his Reply, McClure argued that the structural error to which he was subjected by the district court constitutes plain error. Simply, the magnitude of a structural error occurring during a trial is equivalent to plain error.

When this Court adopted the "plain error" doctrine in *Halldorson v. Halldorson*, 175 Mont. 170, 573 P.2d 169 (1977), it did so to ensure proper protection of a party's fundamental constitutional rights.

Ordinarily errors not raised below will not be considered on appeal, however, this rule is subject to the exception that when the question is raised for the first time on appeal it relates to the fundamental rights of the parties...In adopting the "plain error" doctrine we believe that appellate courts have a duty to determine whether the parties before them have been denied substantial justice by the trial court, and when that has occurred we can without our sound discretion, consider

whether the trial court has deprived a litigant of a fair and impartial trial, even though no objection was made to the conduct during the trial.

Halldorson, 175 Mont. at 173-174, 573 P.2d 169, 173.

This Court specifically cited a case from the state of Washington acknowledging the unique role played by appellate courts.

The exception to [the rule that errors not raised below will not be considered on appeal] is a salutary one. Courts are created to ascertain facts in controversy and to determine the rights of the parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent.

Id. (quoting and citing *Maynard Investment Co. v. McCann*, 77 Wash.2d 616, 465 P.2d 657, 661 (1970)).

Thus, the underlying foundation behind the “plain error” doctrine is to ensure the parties of a case are not denied justice, especially in cases where an established precedent has been ignored. In McClure’s case, both the district court and McClure’s counsel ignored the fact that it was structural error to allow McClure to voluntarily absent himself from his own trial without a knowing, voluntary and intelligent waiver.

According to this Court’s established precedents, “structural error” is an error that is “typically of constitutional dimensions, precedes the trial, and

undermines the fairness of the entire trial proceeding.” *State v. Dewitz*, 2009 Mont. 202, ¶ 44, 351 Mont. 182, 212 Mont. 1040 (internal citations and quotations omitted). In short, a structural error is an error which is “presumptively prejudicial” because it deprives a litigant of a fair and impartial trial. Given its magnitude, a structural error is a plain error almost by definition. Both errors deprive a party of, not only justice, but of a substantial constitutional right; in this case, the right to a fair trial.

As indicated by McClure’s briefs, this Court has a series of precedents which set forth, in detail, why it is structural error for a district court to allow a criminal defendant to voluntarily absent himself from his own criminal trial without the court first obtaining a knowing, voluntary and intelligent waiver of the defendant’s right to be present.

In failing to address that McClure’s trial was subject to structural error based solely on McClure not arguing “plain error” doctrine, is to place semantic phrasing over the fact that, in McClure’s case, his argument regarding structural error is a plain error argument. In this case, where there was an error which affected the fundamental fairness of the entire proceedings, the distinction between “structural error” and “plain error” is one without a difference.


In *State v. Finley*, 276 Mont. 126, 915 P.2d 208 (1996), this Court indicated

the “plain error” doctrine would be in situations where “failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.” *Finley*, 276 Mont. at 137-138, 915 P.2d at 215. This Court has on numerous occasions indicated that a criminal defendant’s absence from critical stages of his trial without first obtaining the defendant’s contemporaneous, personal, knowing, voluntary, intelligent and on-the-record waiver is structural error which undermines the integrity of the entire trial. See *State v. Bird*, 2002 MT 2, ¶ 40.

Therefore, a structural error which undermines the integrity of the entire trial is the equivalent of a plain error which, if not considered by the Court, leaves unsettled the question of the trial’s fundamental fairness.

Based on the foregoing argument, and the argument regarding this issue as contained in McClure’s reply brief, McClure respectfully requests this Court grant his Petition for Rehearing and decide the merits of McClure’s appeal on Issue I set forth in his opening brief. In McClure’s case, the structural error was a plain error.

Respectfully submitted this 16th day of July, 2010.

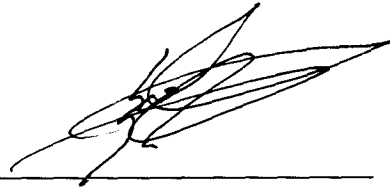


Colin M. Stephens
Attorney for Defendant & Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Petition for Rehearing is printed with a proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 2,500 words as calculated by my WordPerfect X3 software.

Dated this 16th day of July, 2010.

A handwritten signature in black ink, appearing to read 'Colin M. Stephens', written over a horizontal line.

Colin M. Stephens
SMITH & STEPHENS, P.C.
Attorney for Defendant & Appellant

CERTIFICATE OF SERVICE

I, Colin M. Stephens, do hereby certify that I delivered a true and correct copy of this Petition for Rehearing to the following via the means indicated:

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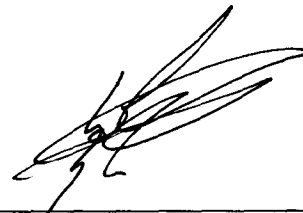
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Dated this 16th day of July, 2010.



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